IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2006-0363
Appellee,	)	DEPARTMENT B
	)	
v.	)	MEMORANDUM DECISION
	)	Not for Publication
CLEMENT JUSTIN LEWIS,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20054899

Honorable Stephen C. Villarreal, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and Michael T. O'Toole — Phoenix
Attorneys for Appellee

Thomas Jacobs — Tucson
Attorney for Appellant

E S P I N O S A, Judge.

¶1 After being tried in absentia by a jury, appellant Clement Lewis was convicted of one count each of aggravated driving under the influence of an intoxicant (DUI) while his license was suspended or revoked, a class four felony; aggravated driving with a blood alcohol concentration (BAC) of .08 or more while his license was suspended or revoked, a

class four felony; aggravated DUI with two prior DUI convictions while his license was suspended or revoked, a class four felony; and aggravated driving with a BAC of .08 or more with two prior DUI convictions, a class four felony. The trial court imposed concurrent, presumptive sentences of 2.5 years' imprisonment on each count, to be served consecutively to his sentence in a separate case. On appeal, Lewis contends the trial court erred in allowing the criminalist to testify to Lewis's BAC, in admitting documents to prove his prior convictions, and in giving a particular jury instruction. Finding no error, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the convictions. *See State v. Mangum*, 214 Ariz. 165, ¶ 3, 150 P.3d 252, 253 (App. 2007). In June 2005, Pima County Sheriff's Deputy Gardner observed a pickup truck stop for a green traffic light, wait for "30 seconds to a minute," and then make "a slow, gradual, right-hand turn." Gardner followed the truck and observed it weaving within its lane. Gardner initiated a traffic stop of the vehicle, which halted in the traffic lane and "then gradually and slowly made its way into the [adjacent] parking lot area." Lewis, the only occupant of the vehicle, provided an Arizona identification card but not a driver's license.

¶3 Gardner noted an odor of intoxicants in the "cab area" of the truck, and he observed Lewis's eyes were watery, red, and bloodshot; his fine motor skills appeared unusually slow; and he was unable to remember why he was looking in the glove compartment. Lewis admitted having had "[a] few" drinks, and he mumbled when he spoke. When Lewis got out of the truck at Gardner's request, he needed to steady himself on the

driver's door, and he swayed while standing. Lewis exhibited six cues on the horizontal gaze nystagmus (HGN) test but refused any further field sobriety tests. Gardner arrested Lewis, who waived his *Miranda*[1] rights and admitted he had previously been arrested for DUI and his license was suspended. Lewis agreed to a blood test pursuant to A.R.S. § 28-1321, Arizona's implied consent statute. Gardner's partner, Deputy Curtin, drew Lewis's blood, and Gardner took custody of the blood sample and secured it for testing.

¶4 At trial, Department of Public Safety criminalist Ruskin testified Lewis's BAC was measured at .211. The state presented proof that Lewis had two prior municipal court DUI convictions, and he was convicted and sentenced as noted above.

Alcohol Test Results

¶5 Lewis first argues Deputy Curtin's failure to testify at trial deprived the state of the necessary foundation for Ruskin's testimony about Lewis's blood test results because of a "lack of testimony regarding the identity and qualifications of the officer who actually drew the blood sample as well as the sterilizing agent that was used." Although Lewis also attempts on appeal to raise a Confrontation Clause argument, claiming he was denied cross-examination of the witnesses against him, his only objection at trial was to a lack of foundation.[2] We review for an abuse of discretion a trial court's determination of the

[1]*Miranda v. Arizona*, 384 U.S. 436 (1966).

[2]In neither instance has Lewis made an objection to the chain of custody of the blood samples. And we note that any flaws in the chain of custody would go not to the admissibility of the evidence but to its weight, which is determined by the jury. *See State v. Morales*, 170 Ariz. 360, 365, 824 P.2d 756, 761 (App. 1991).

sufficiency of the foundation for evidence. *See State v. George*, 206 Ariz. 436, ¶ 28, 79 P.3d 1050, 1060 (App. 2003).

¶6 Our analysis must begin with A.R.S. § 28-1388(A), which states:

> If blood is drawn under [Arizona's implied consent statute], only a physician, a registered nurse or another qualified person may withdraw blood for the purpose of determining the alcohol concentration or drug content in the blood. The qualifications of the individual withdrawing the blood and the method used to withdraw the blood are not foundational prerequisites for the admissibility of a blood alcohol content determination made pursuant to this subsection.

As noted above, Lewis objected at trial only to the foundation for the blood test results based on Curtin's failure to testify. But the plain language of the statute suggests Lewis's objection to be groundless.

¶7 Lewis relies on *State v. Carrasco*, 203 Ariz. 44, 49 P.3d 1140 (App. 2002), to support his claim that Curtin's qualifications were essential, but that case is inapposite. *Carrasco* addressed the qualifications of the person drawing blood in the context of a motion to suppress that asserted a blood draw performed by an unqualified person was an unreasonable search whose results should be suppressed. *See id.* ¶ 4. Lewis made no such argument here. At trial, the only evidence to which Lewis objected was his actual, numerical BAC. He did not move to suppress any evidence of the blood draw or testing, and he did not contend the draw itself was somehow improperly performed.

¶8 We find that *State v. Nihiser*, 191 Ariz. 199, 953 P.2d 1252 (App. 1997), controls. That case, cited by both parties, addressed the prior version of § 28-1388, which

contained language substantively identical to the current statute.[3] *Nihiser* explained that the statute requires "evidence . . . that someone trained in blood withdrawal—a physician, nurse, or other qualified person—actually drew the blood, but does not require evidence of the individual's professional qualifications or credentials or of the method used to draw the blood." *Id*. at 202, 953 P.2d at 1253. A person may be qualified to draw blood under § 28-1388(A) "if he or she is competent, by reason of training or experience, in that procedure." *State ex rel. Pennartz v. Olcavage*, 200 Ariz. 582, ¶ 20, 30 P.3d 649, 655 (App. 2001); *see also Carrasco*, 203 Ariz. 44, ¶ 10, 49 P.3d at 1141 ("[T]he trial court only need[s] to determine the competence of the person who drew defendant's blood through evidence of training or experience.").[4] At trial, Gardner testified Curtin was his partner, he had seen documentation of Curtin's "completion of a phlebotomy school . . . in Phoenix," and he had observed Curtin make "several hundred" blood draws before this one. After drawing the samples from Lewis, Curtin gave them to Gardner, who "placed them in evidence."

¶9 Although Lewis relies on *Nihiser*, we note the same situation existed in that case as here—the person who drew the blood did not testify, and evidence of his qualifications was provided through the testimony of two police officers: one who stated "a

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[3]The statutory language analyzed in *Nihiser* read: "The qualifications of the individual withdrawing the blood and the method used to withdraw the blood shall not be foundational prerequisites for the admissibility of any blood alcohol content determination made pursuant to this subsection." 191 Ariz. at 201, 953 P.2d at 1254, *quoting* former A.R.S. § 28-692(F).

[4]In opposing Lewis's foundational objection, the prosecutor noted that Curtin is the same deputy this court found "qualified" under § 28-1388 as of November 2002 in *State v. May*, 210 Ariz 452, ¶ 10, 112 P.3d 39, 42 (App. 2005), decided shortly before Lewis's trial.

member of the hospital staff" had drawn the blood, and another who "testified that the person had told him he was a doctor and the person's name tag identified him as a doctor." 191 Ariz. at 203, 953 P.2d at 1256. We held the officers' testimony provided sufficient foundation to determine that a "qualified person" had drawn the blood pursuant to the statute and thus, admitting the test results was proper. *Id*. at 203-04, 953 P.2d at 1256-57; *see also State v. Hurles*, 185 Ariz. 199, 206, 914 P.2d 1291, 1298 (1996) (acceptable for police officer to testify he "saw [Officer] Holmes preparing Hurles for fingerprinting, left the room [while] the actual fingerprinting was done, then was handed the completed cards by Holmes"); *State v. Morales*, 170 Ariz. 360, 364, 824 P.2d 756, 760 (App. 1991) (sufficient foundation when nurse testified "he had observed blood being drawn from [Morales] by another emergency room nurse"). Lewis's reliance on *Nihiser* is therefore unavailing. Based on Gardner's testimony, the trial court could properly find that Curtin was qualified to draw Lewis's blood. *See George*, 206 Ariz. 436, ¶ 28, 79 P.3d at 1060.

¶10 Lewis also contends, however, as he did below, that he "was denied the right" to challenge the sterilizing agent used and whether there may have been any contamination of the blood, and he claims Curtin's testimony was necessary to provide that information. This argument is unpersuasive because the sterilization process employed before the blood draw would be part of "the method used to withdraw the blood" and, thus, not necessary foundation pursuant to § 28-1388. Moreover, Gardner testified that Curtin used an "antiseptic" to clean the arm, that "povidone iodine" is the sterilizing agent included in the standard blood-draw kit, and that the agent actually used was documented in the blood-test

report that "accompanies the blood kit" although it was not part of his narrative report. Ruskin testified that "povidone iodine" does not contain ethanol, which is the only alcohol he tests for. Ruskin also stated that use of an ethanol swab could theoretically contaminate a blood sample but that medical research had not been able to document such an effect.

¶11 Lewis additionally seeks to raise a Confrontation Clause argument, asserting "[t]he trial court effectively denied [him] the right to confront and cross-examine the witnesses against him by allowing Deputy Gardner to provide the testimony regarding the actual blood draw." But he fails to support this argument, citing no authority grounded in the Sixth Amendment or Confrontation Clause except in reciting a standard of review. And, because he failed to raise the objection at trial, he has forfeited all but fundamental error review. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). "[A] defendant must establish prejudice to qualify for relief under [a fundamental error] standard of review." *Id*. ¶ 20.

¶12 Both Gardner and Ruskin testified at trial and were cross-examined by Lewis. Lewis objected to Ruskin's testimony about the results of his laboratory tests solely on foundational grounds. Although it was Curtin who had drawn Lewis's blood, no statements by Curtin were introduced at trial. Instead, having personally observed the entire procedure, Gardner testified based on his own observations. Lewis now claims Curtin's presence was necessary to "cross-examine and challenge [Curtin]'s training, experience, the sterilizing agent used and whether there may have been any contamination of the blood during the actual draw or the actual process followed in insuring the integrity of the blood after the

draw." But Lewis raised none of those issues in the context of his confrontation rights and, as discussed above, under § 28-1388, none of the information mentioned was essential evidence. We also note Lewis was entitled to subpoena Curtin to testify if he believed Curtin's testimony would be crucial to his defense. We see no fundamental error or prejudice to Lewis. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607.

Prior Conviction Documents

¶13 Lewis next argues the court erred in admitting documents establishing his prior DUI convictions, claiming irregularity in their certifications. The state contends Lewis has abandoned the argument he made below and, in any event, the exhibits were properly certified. We review a trial court's decision to admit or exclude evidence for a clear abuse of discretion. *State v. Barger*, 167 Ariz. 563, 566, 810 P.2d 191, 194 (App. 1990).

¶14 Lewis was charged with two counts of aggravated DUI for which the existence of two prior DUI convictions was an element of the offense. The state was thus required to prove those convictions, and it identified and offered certified copies of convictions in the Casa Grande Magistrate Court. Lewis challenged these exhibits, asserting "there's not a seal on each and every page of the court records that the State proposes be admitted." But he then stipulated that "the actual court records, themselves, correspond to the court records that are attached to those certifications."

¶15 As the state notes, Rule 902, Ariz. R. Evid., sets out the requirements for a document to be self-authenticating and admissible. Rule 902(4) defines a certified copy of a public record as "[a] copy of an official record or report or entry therein . . . certified as

correct by the custodian or other person authorized to make the certification." Arizona courts have also addressed the issue of certification, holding documents that "accompanied and were attached to the certified abstract . . . and were part of the certification . . . did not have to be separately certified." *State v. Stough*, 137 Ariz. 121, 123, 669 P.2d 99, 101 (App. 1983). The trial court did not abuse its discretion in ruling the documents admissible. *See Barger*, 167 Ariz. at 566, 810 P.2d at 194.

¶16 On appeal, as the state points out, Lewis has abandoned his claim that the records must have a "seal on each and every page." Instead, he relies on *State v. Robles*, 213 Ariz. 268, 141 P.3d 748 (App. 2006), to argue the foundation for admitting those documents was insufficient. *Robles*, however, addressed the requirements to prove prior convictions not as an element of the charged offense but for sentence enhancement or aggravation purposes post-verdict. *Id.* ¶ 3. For the jury to find Lewis had prior DUI convictions, the state was required to present evidence that "reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Davolt*, 207 Ariz. 191, ¶ 87, 84 P.3d 456, 477 (2004). We will find the evidence supporting a jury verdict insufficient "only if 'there is a complete absence of probative facts to support the [jury's] conclusion.'" *State v. Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d 391, 394 (App. 2000), *quoting State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988).

¶17 Here, the jury received redacted copies of Lewis's Casa Grande convictions[5] and a copy of the photograph of Lewis in his Motor Vehicle Division (MVD) records. It heard Gardner testify the photograph appeared to be the man he had arrested who had admitted having prior DUI arrests and a suspended license based on a prior DUI violation. The MVD photograph included a copy of Lewis's signature from his driver's license, which the jury was able to compare to signatures on the Casa Grande court documents. And the MVD custodian of records testified to Lewis's full name, date of birth, weight, and home address, all of which were identical to the information contained in the Casa Grande court records. From this evidence, the jury could permissibly conclude Lewis was the same Clement Lewis who had been previously convicted of DUI in Casa Grande. *See Carlisle*, 198 Ariz. 203, ¶ 11, 8 P.3d at 394. Although this may be circumstantial evidence of Lewis's prior convictions, a jury may determine guilt based on circumstantial evidence. *See State v. Webster*, 170 Ariz. 372, 374, 824 P.2d 768, 770 (App. 1991) (criminal conviction may be based on circumstantial evidence).

Jury Instruction

¶18 Lewis lastly contends the trial court erred by instructing the jury it could consider his refusal to submit to field sobriety tests in reaching a verdict. The state correctly notes that Lewis has forfeited all but fundamental error review by his failure to object to this

[5]It appears the jury received redacted copies of the Casa Grande convictions without the certification attached, although the record also contains unredacted copies with the certification attached, which the court used in considering the admissibility of the documents.

instruction at trial, *see Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, and contends there was no error in the instruction.

¶19 The trial court instructed the jury as follows:

> A police officer investigating possible intoxication or alcohol influence in a driver may lawfully request that the driver perform field tests as part of the investigation.
>
> If you find that the defendant refused to submit to such tests, you may consider such evidence together with all the other evidence.

Lewis concedes the evidence that he refused all field sobriety tests except the HGN test was admissible but claims the jury instruction "had the effect of unduly focusing on the refusal" and "amounted to a comment on the evidence." Lewis then concludes that, "[i]f evidence is admissible, then no further instruction is necessary or permissible." In *State v. Bedoni*, 161 Ariz. 480, 485-86, 779 P.2d 355, 360-61 (App. 1989) (citations omitted), Division One of this court stated: "The court may instruct the jury that a defendant's refusal to submit to a test may be considered as evidence against him. Moreover, the instruction is proper because it directs a permissive presumption, not a mandatory one." A trial court comments on the evidence when it "expresses [an] opinion about the evidence." *State v. Baltzell*, 175 Ariz. 437, 440, 857 P.2d 1291, 1294 (App. 1992). Instructions to the jury limiting the jury's consideration of certain evidence are permissible. *Id*. The instruction here permitted the jury to consider Lewis's refusal in reaching its verdict, if it first found Lewis had refused

to perform the tests. The instruction did not express any opinion about evidence presented at trial.[6]

¶20 Lewis has failed to argue or provide authority showing that any potential error was fundamental—that is, "error [that] goes to the foundation of the case or deprives [him] of an essential right to his defense." *State v. White*, 160 Ariz. 24, 31, 770 P.2d 328, 335 (1989). He has thus failed to carry his burden of showing that fundamental error occurred and that the error caused him prejudice. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

Disposition

¶21 Lewis's convictions and sentences are affirmed.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

_____
PETER J. ECKERSTROM, Presiding Judge

_____
GARYE L. VÁSQUEZ, Judge

[6]Lewis additionally cites *State v. Jones*, 211 Ariz. 413, 121 P.3d 1283 (App. 2005). But *Jones* addressed a Fourth Amendment issue and held evidence of a refusal to perform field sobriety tests admissible; it did not consider what jury instructions should be given relating to such evidence. *Id*. ¶ 6.